

**Response to Comments
Fidelity Exploration and Production Company
MPDES Permit # MT0030724**

On April 27, 2005 the Department issued public notice MT-05-05, stating the Department's intent to issue a wastewater discharge permit to Fidelity Exploration and Production Company. The notice stated that the Department had prepared a draft permit, statement of basis, environmental assessment, and would hold two public hearings on this matter.

Public hearings were conducted on May 31, 2005 at the Bicentennial Library in Colstrip, MT and at the Blessed Sacrament Catholic Church in Lame Deer, MT on June 1, 2005. The notice stated that all substantive comments must be received or postmarked by June 10, 2005 to be considered in formulation of a final determination and issuance of the permit. The normal 30-day comment period was extended by 15 days, because of requests made to the Department.

In accordance with ARM 17.30.1374, transcripts of the public hearings have been prepared and are included in the administrative record. The Department has considered these comments in preparation of the final permit and decision.

The following tables identify individuals supplying written or oral comments on this permit action.

Table 1- List of Persons submitting comments

No.	Commentor – MT0030724
1	Michael Bergstrom – Fidelity Exploration
2	Eric Olsen
3	Tom Emmons
4	Janet Rice
5	Larry Woolston
6	Shiloh Small
7	Tami McCullough
8	A.L. and Betty Collins
9	Brenda Lindlief Hall
10	Glenn Gay
11	Mr. & Mrs. Lester Aye
12	NPRC – Michael Reisner
13	IPAMS – Marc W Smith
14	MEIC – Jeff Barber
15	EB Ranch – Dick/Connie Wilson
16	Rosebud Conservation District/Jim Rogers
17	Affidavit/Northern Cheyenne Tribal Members
18	EPA – John Wardell
19	Fidelity – Michael Bergstrom
20	Brenda Lindlief Hall – Reynolds, Motl, & Sherwood
21	Mark Fix
22	DNRC – Jack Stults
23	Eugene LittleCoyote-Northern Cheyenne Tribe
24	Conrad Fisher – Northern Cheyenne Tribe
25	Huber Energy – William W DeLapp

26	USFWS-R Mark Wilson
27	State of Wyoming
28	Mark Fix, (NPRC)
29	Ray Muggli, (NPRC)
30	Roger Muggli, (T&YID)
31	Connie Morris, (Area Ranching Family)
32	Rick Rice, (Area Ranching Family)
33	Calvin Rice, (CFRD)
34	Bill Schafer, (Schafer LTD)
35	Mike Bergstrom, (Fidelity)
36	Randy Shannon, (Area Ranching Family)
37	Carol Red Cherries
38	Adeline Fox
39	Lavando Fisher
40	Lucille Spear
41	Bill Schafer
42	Joe Walksalong, Jr.
43	Patricia Ramos
44	Misty Pipe
45	Micciah Birdinground
46	Gail Small
47	Marcella Hart Sitting Man
48	Bisco Spotted Wolf
49	Jason Whiteman, Sr.
50	Linwood Tall Bull
51	Edwin Standing Elk
52	Elsie Standing Elk Wick
53	Art Hayes, Jr.
54	Lafe Haugen
55	Joe Fox, Jr.
56	Fred Small
57	William Walksalong
58	Mark Roundstone
59	Robert McClean, Jr.
60	Steve Brady, Jr.
61	Alvina White Bird
62	Judy Spang
63	Catherine Shoulder Blade

Response to Comments: MPDES Permit MT0030724

1. Comment: Commenter requests two proposed plans of development (PODs) (Pond Creek, and Deer Creek North) be included in the facility description. (1,19)

Response: The permit authorizes discharge of CBNG produced water to the Tongue River. The permit does not restrict the source of the produced water.

2. Comment: The impoundment referred to in the Fact Sheet, as Reservoir 34E-3490 should not be considered part of the "treatment system" because it will only be used to hold water that bypasses the treatment system. The preferred method of discharging water stored in the Reservoir will be to discharge the water without treatment under MPDES Permit No. MT0030457. Since some water in the Reservoir may have to be discharged under this permit as a matter of exigency, the Fact Sheet should at least clarify that no other impoundment owned by Fidelity will be considered as part of the "treatment system." (1,13,19)

Response: DEQ agrees that no impoundment, except for the Reservoir identified above, is part of the "treatment system" authorized by this permit.

3. Comment: One commenter questioned DEQ's authority to require ground water monitoring for impoundments that are exempt from ground water permits under 75-5-401(5)(e), MCA. Other commenter's believed these impoundments should be identified as point source discharges to state waters. As state waters, standards adopted to protect water use classifications must be applied. (1,12,23,19,21)

Response: Despite the ground water permit exemption in 75-5-401(5)(e), MCA, DEQ may require a source exempt from the permit requirements to conduct monitoring if the source "is likely to cause violations of ground water quality standards." Based upon the known quality of the CBM water that will be stored in the impoundments, DEQ has determined that seepage from the impoundments will likely cause violations of ground water specific conductance standards. Therefore, DEQ has authority to require monitoring under 75-5-401(7), MCA.

The applicant has not requested permit coverage for these impoundments. The Department can not designate a point source in a permit action. The water quality act prohibits the discharge of waste to state waters without a current permit. These impoundments are not authorized to discharge to state waters except through the outfall designated in the permit.

DEQ also disagrees that the impoundment should be considered "state waters." Since the impoundments are used "solely for treating, transporting, or impounding pollutants," the impoundments are exempt from the definition of state waters pursuant to 75-5-103(29)(b)(i), MCA. Any incidental use of the CBM waste water by livestock or wildlife does not eliminate the sole purpose of the impoundment, which is to store CBM water.

4. Comment: Several commentors expressed concern over the excessive and redundant monitoring required by the ground water management plan for the impoundments. Other commentors expressed concern over establishing baseline ground water quality prior to constructing the impoundments and concern over additional mitigation that may be imposed. (1,9,12,13,16,19,23,42,44,49,56,57,58)

Response: DEQ believes that monitoring is necessary and justified under §75-5-401(5) MCA. Baseline data is necessary for purposes of comparing and identifying impacts to existing water quality.

Corrective actions as set out in the plan and/or mitigation measures as set forth by the DNRC for the controlled ground water area for wells or springs may be necessary over the active life of the

impoundments should leakage/infiltration occur and the aquifer(s) are adversely impacted as a result of CBNG production water impoundments.

5. Comment: Several commenters discussed the status of the TMDL for the Tongue River, not only at the discharge point, but throughout the entire reach of the river. Other commenters question the “new source, new discharger” status under the Molloy decision. (1,12,13,19,21,22,23)

Response: The DEQ believes that issuing the permit is not prohibited by the court order because under the 1996 list, no TMDLs are necessary for the segment where the discharge occurs. Although the segment was listed in 1996 as impaired due to flow alteration, the EPA has since determined that no TMDLs are necessary for segments impaired by “pollution”. According to EPA, TMDLs are only required for “pollutants”. Since flow alteration is considered “pollution” and not a “pollutant”, no TMDLs are necessary prior to issuing the permit.

6. Comment: Several commenters question the use of concentration-based limits in-lieu of a mass based waste load allocation for the discharge. (1,12,13,19,53)

Response: ARM 17.30.1345 requires that all permit limits be expressed in terms of mass except for pollutants such as pH, temperature and radiation which cannot be expressed in terms of mass, or when applicable standards and limitations are expressed in terms of other units of measurement. Limits for specific conductance (or electrical conductivity (EC)), sodium adsorption ratio (SAR), and pH cannot be expressed in terms of mass. Because the permit limits the discharge volume and concentration, the mass of a pollutant is limited.

7. Comment: Comments were received whether blending should be allowed and in what amounts. (1,12,19,21,28,30,46)

Response: In the application received by the Department, the applicant proposed to utilize blending of treated water with raw untreated water up to the standards for EC and SAR. The applicant proposed blending up to 25% of raw untreated water during high receiving water flow conditions. No mixing zone was requested for these parameters.

During the permit development process, blending was evaluated at the maximum concentrations allowed by the nondegradation significance threshold (ARM 17.30.715 and ARM 17.30.670). During the evaluation not only was EC and SAR evaluated for non-significant changes to the receiving waters, but also all of the pollutants of concern contained in Appendix I. Limitations established in the permit reflect the levels of blending allowed, protecting the nondegradation significance criteria for the receiving water on a seasonal basis.

8. Comment: Several commenters expressed that monitoring requirements (effluent, instream and biological) contained in the permit are excessive and exceed the intent of the MPDES permit system. Other commenters expressed that internal monitoring and flow measurement should be prescribed. (1,12,13,19,53)

Response: In establishing monitoring frequencies the Department must consider a number of factors, including type of treatment system, compliance history, cost of monitoring, presence or absence of batch releases and other factors. Electrical conductivity (EC) can be measured on-site and is therefore relatively inexpensive compared to other parameters. It can be used as a surrogate for other parameters and process control purposes and therefore was monitored more frequently. SAR requires laboratory analyses of several parameters (sodium, calcium and magnesium). The treatment process involves internal batch process, however, treated water from the IX unit will report to a neutralization basin (Permit Application). This basin will provide equalization of treated waste streams prior to discharge.

The permit contains extensive monitoring of both the effluent and ambient Tongue River conditions. Upstream monitoring is necessary to adjust wasteload allocation in future permit actions if other sources in the basin have adverse impacts on water quality.

The permit requires monitoring of periphyton communities in order to ensure compliance with Montana's Nondegradation criteria. The commenter recommends that macroinvertebrate monitoring be included as a condition of the permit. Impacts to the macroinvertebrate community were not identified in the analysis as an area of concern. The permit requires whole effluent testing (WET) of the effluent and receiving water on a salt sensitive invertebrate and fish species that will provide additional information on the impact to aquatic life.

Flow monitoring from the treatment facility has been prescribed on a continuous basis (SOB Table 4, and Part I.C. Monitoring Requirements in the permit) with instantaneous readings. The permittee will be required to submit a process line drawing to the Department for review and approval, depicting sampling and monitoring locations at the facility. If deficiencies are noted, locations or methods may be changed to ensure compliance to permit conditions.

9. Comment: Commentor questions DEQ's authority to require a Water Management Plan for the entire project and requests clarification indicating that only the BOGC and BLM have authority to require such plans. (1,19)

Response: DEQ will modify the SOB to clarify that only the BOGC and BLM have authority to require such plans as stipulated in the Record of Decisions issued by those agencies.

10. Comment: Commenter questions the validity of using seasonal 7Q10 receiving water flow rates in permit development. (1,34,44)

Response: ARM 17.30.670 requires the Department to evaluate compliance with water quality standards to be determined by using a flow-based analysis that considers a range of flows or monthly flow probability. By utilizing the USGS seasonal 7Q10 flow probabilities the Department satisfies the criteria of "a range of flows" criteria, but it also satisfies ARM 17.30.715, ARM, 17.30.635, and ARM 17.30.516 to utilize the 7Q10 of the receiving water to determine permit requirements.

The applicant proposed a daily flow scenario that would allow adding or subtracting flows, based on instream conditions. The Department determined the proposed discharge strategy would not ensure compliance to permit conditions and water quality standards. But utilizing the seasonal 7Q10 established by the USGS, a range of flows were taken into account, while still fulfilling the mandate for using 7Q10s to determine worse case scenarios.

11. Comment: Commenters state that by issuing permits without TBEL or BPJ limits it is in violation of CWA, the state constitution, and WQA. DEQ has violated the federal Clean Water Act (CWA) and the Montana Water Quality Act by failing to develop and require technology-based permit limits for all parameters of concern using its Best Professional Judgment (BPJ). According to this commentor, 40 CFR §§ 122.44 and 125.3, which are incorporated by reference in the MPDES rules, require DEQ to develop technology-based treatment requirements on a case-by-case basis under § 402(a)(1) of the CWA in the absence of EPA-promulgated effluent limitations. The commentor cites various federal cases in support of using BPJ, including *Trustees for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984); *NRDC v. EPA*, 863 F.2d 1420, 1424 (9th Cir. 1988); and *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923 (5th Cir. 1998). (12,20,28,30,46,49)

Response: DEQ disagrees that it has violated the CWA and the Montana Water Quality Act by declining to develop and require technology-based effluent limits for all parameters of concern using BPJ. Neither the federal rules nor the cases cited by the commentor mandate the development of technology-based effluent limits on a case-by-case basis.

According to 40 CFR § 122.44, "each NPDES permit shall include conditions meeting the following requirements *when applicable*." Among the conditions required by the rule "when applicable" are technology-based effluent limits promulgated by EPA or effluent limitations developed on a case-by-case basis under § 402(a)(1) of the CWA or a combination of the two according to the factors in § 125.3. Since there are no EPA-promulgated effluent limitations for coal bed methane produced water, the commentor argues that DEQ must develop technology-based standards using BPJ under § 402(a)(1) of the CWA based upon the factors in § 125.3(c),(d). This comment ignores the fact that technology-based limitations listed under § 122.44 are required for NPDES permits only "when applicable." It is the DEQ's position that developing BPJ under § 402(a)(1) of the CWA is not applicable, because that section of the CWA authorizes EPA, not the states, to develop case-by-case permit limits.

Under § 402(a)(1) of the CWA, NPDES permits may be issued provided that either of the following conditions are met: "(A) all applicable requirements promulgated under sections 1311, 1312, 1316, 1317, 1343 of [the Act]; or (B) prior to the taking of necessary implementing actions relating to such requirements, *such conditions as the Administrator determines are necessary* to carry out the provisions of [the Act]." (emphasis added).

In construing this provision, the Ninth Circuit has *not* held that § 402(a)(1) mandates the development of case-by-case effluent limitations by the states, as argued by the commentor. Instead, the Ninth Circuit has interpreted the language as "authorizing" EPA to use its "discretion" to develop technology-based effluent limits in the absence of promulgated industry-wide standards. *See, Trustees for Alaska*, 749 F.2d at 553; *NRDC*, 865 F.2d at 1425. Nothing in the cases cited by the commentor suggests or implies that § 402(a)(1)(B) also authorizes the states to develop effluent limitations for individual permits. Although the commentor quotes a Fifth Circuit opinion indicating that all NPDES permits *must* incorporate technology-based limitations developed under § 402(a)(1)(B), that case involved a challenge to BAT limitations developed by EPA for a class of industry under § 301. Accordingly the quoted language is dicta since the issue of whether or not the CWA requires EPA or the states to develop case-by-case effluent limitations was not before the court. *Texas Oil and Gas Ass'n*, 161 F.3d at 928.

The DEQ's position that § 402 does not mandate states to develop technology-based limitations is supported by the U.S. Supreme Court's construction of the CWA in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). In *Train*, the petitioners argued that EPA had no authority to promulgate industry-wide treatment standards under § 301 of the CWA. In their view, the provisions of § 301 are to be used by states in the development of technology-based standards on a case-by-case basis for individual permits. In upholding EPA's authority to promulgate nation-wide standards under § 301, the Court rejected the argument that § 402 requires states to develop technology-based effluent limits for individual permits. The Court found that, while § 402 requires permits to comply with § 301, "[§ 402] does not mandate either the Administrator or the States to use permits as the method of prescribing effluent limitations." *Id.* at 120.

12. Comment: Commenter stated, ARM 17.30.1311(7) and its counterpart under the CWA, 40 CFR § 122.41(i), prohibit MDEQ from issuing a permit to a new source or new discharger if the discharge from its operation will cause or contribute to the violation of water quality standards. The lower reaches of the Tongue River frequently violate the numeric water quality standards for EC. Any additional discharges of untreated methane wastewater are likely to cause or contribute to these violations or increase the frequency of such violations. MDEQ has failed to provide any analysis why the prohibition is not applicable to the two draft permits (12).

Response: The commenter by citing ARM 17.30.1311(7) is referring to new sources or new discharger proposing to discharge into a *segment* that will cause or contribute to a violation of water quality standards (emphasis added). In the permit development the analysis evaluated the stream segment the proposed discharge reports to. The analysis verified that in that segment, water quality standards were not exceeded at the edge of the mixing zone or immediately down stream from the project area. In addition, the analysis demonstrated there were sufficient pollutant load allocations available in the receiving water, within the segment the discharges reports to [ARM 17.30.1311(7)(a)]. The commenter wrongly asserts that receiving water quality outside the stream segment should drive permit development.

Since the public notice of the tentative decision to issue discharge permits to Fidelity, the Department has determined the lower segment of the Tongue River is impaired for salinity. To ensure all beneficial uses of the river are met, the Department conducted additional analysis of the receiving water at Miles City. The following is a summary of the analysis conducted on the Tongue River at Miles City.

The analysis found that the treatment discharge would not cause or contribute to the exceedance of either the monthly mean or instantaneous max EC standards at the levels proposed in the draft permit. The EC concentration of the effluent is typically less than the instream concentration in the Tongue River at Miles City.

13. Comment: Commenter stated the permit fails to include effluent limitations to protect aquatic life. Additional comments were made concerning WET monitoring within the mixing zone. Other comments stated that the WET monitoring requirements contained in the permit is excessive. (12,19, 53)

Response: The permit requires that, *There shall be no acute toxicity in the effluent.* Under Part I(C) of the permit, acute toxicity is to be tested on a quarterly basis. Testing will employ two species per quarter, and will consist of five effluent concentrations and a control.

In prescribing a no acute toxicity limitation, no toxicity is allowed in the mixing zone. WET testing using a dilution series will effectively represent any synergistic affect that may be present in the mixing zone; therefore additional WET monitoring in the mixing zone is unwarranted.

The monitoring required in the permit is the minimum needed to determine the natural variation that may be present in the effluent. If no toxicity is observed in one year of testing, the Department will allow for a reduction in the protocol in testing. Once this requirement is met, the permittee can reduce the number of species used in each sampling period from two to one, but alternation between the two. Language will be inserted in the permit stating:

If no acute toxicity is observed for four consecutive calendar quarters, testing may be reduced to alternating one species quarterly testing.

14. Comment: Commenter's state, the permit will allow degradation to the receiving water without an authorization issued under §75-5-303(3) MCA. (12,14,20)

Response: DEQ disagrees that the permit will allow degradation. Under 75-5-103(5), MCA, the term "degradation" does not include changes in water quality determined to be nonsignificant under 75-5-301(5)(c), MCA. The Board of Environmental Review has adopted rules implementing 75-5-301(5)(c), MCA, which establish criteria that are used by the DEQ for determining when a discharge is "nonsignificant." See ARM 17.30.715. DEQ has applied the criteria to the discharge authorized by the permit and has determined that the discharge is nonsignificant. Therefore, the discharge does not need to be authorized under 75-5-303, MCA

15. Comment: Commenter states the Department's implementation of the EC and SAR standards are unconstitutional. (12)

Response: The Board of Environmental Review has adopted water quality standards and nondegradation requirements for these constituents [ARM 17.30.670]. The constitutionality of the rule is beyond the scope of the MPDES permit.

16. Comment: Commenter states the Department should have required the instream and nutrient monitoring plans and made them available for public comment. (12)

Response: The permit (Part I(D)(2)), requires monitoring plans be developed according to Department standard operational procedures. The permittee is to submit for review, plans to ensure compliance with permit conditions. The Department's SOPs do not change from permit to permit.

17. Comment: Commenter states that a mixing zone can only be granted, "if the discharger has implemented all available technology-based control and treatment requirements". Additional comments state the MZ is too restrictive and another states that the MZ is not defined. (12,19,21)

Response: The permittee has requested that the entire design flow (7Q10) of the stream be used to develop permit effluent limits for some parameters (fluoride and ammonia). In order for the Department to allocate the entire design flow of the receiving water body, the mixing zone must be considered nearly instantaneous [ARM 17.30.501(7)]. A nearly instantaneous mixing zone may be granted when there is an effluent diffuser that extends across the entire stream or when the discharger demonstrates in accordance with a study plan approved by the Department that the effluent is fully mixed within two river widths. The applicant submitted a diffuser designed to meet these criteria.

The Department has determined a mixing zone of 25 feet downstream from the insertion point across the entire stream width is appropriate. The mixing zone has been verified with Cormix and only includes the near field region where active mixing is undertaken.

The Department does not agree that mixing zones may only be granted, "if the discharger has implemented all available technology-based control and treatment requirements". The WQA makes no such provisions. ARM 17.30.1303(m) incorporates by reference 40 CFR 125.3, which defines criteria and standards for implementation of technology based treatment standards in permits. Contained in 40 CFR 125.3(e), it requires technology based standards be applied prior to or at the point of discharge. Whereas (f) states technology based standards cannot be achieved by "non-treatment" techniques such as flow augmentation. Other criteria follow, but in effect these regulations do not allow for mixing zones to meet technology-based limits.

Montana's Water Quality Act defines mixing zones as: "an area established in a permit or final decision on nondegradation issued by the department where *water quality standards* may be exceeded, subject to conditions that are imposed by the department and that are consistent with the rules adopted by the board", §75-5-103(18) MCA, (emphasis added). In this permit action it is reasonable and appropriate to grant a mixing zone for specific parameters to meet the nondegradation criteria for significance. ARM 17.30.715 allows for nonsignificant changes to water quality at the downstream most edge of mixing zones at §715 (c) & (f). Since reasonable potential and permit limits are developed using nondegradation criteria, which are derived from water quality standards, it is appropriate to grant mixing zones.

18. Comment: Commenter states that the pH standards should be reconciled between the SOB and the Permit. (18)

Response: The pH values will be changed to reflect B-2 water use classification of 6.5-9.0 su.

19. Comment: Commenter states the limitation against the addition of other waste streams needs to be included in the permit. (18)

Response: The narrative limitation will be added to the permit: The effluent is composed entirely of produced water from CBNG development; no sewage, industrial, or other wastes may be added to the treatment system.

20. Comment: Commenter states that the comment raised in the public hearing to suspend permitting activities until the Board of Environmental Review acts upon rule making is illegitimate and has no regulatory or technical basis. Additional comments state the permits should be set aside until acted upon by the board. (12,19,21,28,30,33)

Response: State and federal regulations list the specific causes for which a permit issued under the National Pollutant Discharge Elimination System (NPDES) may be terminated or denied [ARM 17.30.1363 and 40 CFR 122.64]. In summary these 'causes' are: 1) noncompliance with a permit condition; 2) the permittee's failure to fully disclose relevant information or misrepresentation of facts; 3) endangerment of human health or environment; and, 4) elimination of the condition regulated by the permit.

The Department has a statutory responsibility to issue or deny permits in a timely manner. Setting aside permits for actions outside the scope of regulatory oversight does not constitute "cause".

21. Comment: Commenter states language in the SOB should be clarified to show the variability of flow rates through the treatment units. (19)

Response: Even though the IX units may have some latitude in processing variable flow rates, the maximum flow rate disclosed in the application is used in the development of permit conditions. Once the permit is issued, the permittee is responsible for operation of the treatment facility (at any flow rate up to the maximum) to meet the limitations contained in the permit.

22. Comment: Commenter states the correct temperature standard be used in setting temperature limits. (19)

Response: Comment noted. Further analysis and examination of the reasonable potential tables in the appendixes shows no change in potential to exceed standards for this parameter.

23. Comment: Commenter expresses that it is an unreasonable approach to limit total nitrogen in the permit, based upon a less than value in the reasonable potential determination. (19)

Response: In the permit application, a level of anticipated treatment, including blending at various receiving water flow rates was submitted. In the analysis, total inorganic nitrogen was listed as a parameter. At comparable receiving water flow rates, with comparable blending allowances, reasonable potential was found to be present, (MPDES permit application, June 2004). Total inorganic nitrogen is a measure of ammonia and nitrate+ nitrite, but does not capture all the nitrogen species present.

In Attachment 3 of the application (summary of water quality results), total nitrogen is listed as <1.0 mg/l. When evaluated at the upper bound estimate during the reasonable potential analysis this parameter also showed the potential to exceed standards. In the analysis, the water quality criteria used to determine potential was the ambient receiving water plus the trigger value found in WQB-7.

Nutrients, including total nitrogen and phosphorus are present in the effluent at levels that may affect plant growth. Since this response is difficult to predict, especially at lower levels, the Department has required that the permittee conduct nutrient monitoring of the receiving water for the term of the permit.

In addition, the permit development reflects the fact that the downstream reservoir is listed as partially impaired for nutrients. To prevent additional nutrient load to the reservoir the Department is limiting the nutrients discharged to the upper river.

24. Comment: Commenter states that baseline data used in the permit development is not representative of true baseline conditions. Commenter stated that chemical specific and biological baseline water quality data has never been established. (9,20, 22,31,34,41,53,59)

Response: DEQ disagrees that there is insufficient baseline data to issue the permit. There is extensive water quality data in the Tongue River watershed that has been collected in the Tongue River watershed prior 1975 for a majority of the parameters of concern. There is also ongoing data collection and information collected from numerous sampling sites in the basin and coal bed methane wells in the watershed, including the monitoring data obtained from Fidelity. The data is sufficient to support the assumption that issuing the permit will not cause violations of Montana's water quality standards and nondegradation requirements in the Tongue River.

As a precautionary measure to ensure that DEQ's assumptions and information are correct, DEQ is requiring extensive monitoring for numerous parameters that are identified in Tables 4 through 6 in the statement of basis. In the event DEQ's assumptions are proven incorrect for one or more of the monitored parameters, the DEQ will re-open the permit to specify a WQBEL for the parameter based upon the ongoing data collection at the site.

Based upon the discussion above, DEQ believes it is reasonable to issue the permit on the assumption that no water quality impacts or degradation will occur. If concurrent monitoring data indicates that there is a potential impact, the permit will be re-opened to address the problem.

25. Comment: Commenter questions why two applications were received and subsequently why two permits were developed for the same project. (21)

Response: There is a substantial difference in the treatment and discharge of the waters the permittee produces. There is no statutory or regulatory requirement to combine applications by the same applicant. Because of the fundamental differences between the two discharges, treated versus untreated waste, the Department believes that issuing two separate permits is appropriate.

26. Comment: Commenter stated: In the effluent limitation table for November 1 through March 1 the SAR and Specific Conductance exceed the values the Tribe has established in its Water Quality Standards. Therefore the tribe is inclined not to support discharge of CBNG produced water into the Tongue River. March 2 through June 30 SAR and Specific Conductance also exceed the Tribe's Water Quality standards. July 1 through October 31 SAR and Specific conductance exceed the Tribe's water quality standards. Additional comments questioned why the proposed nondegradation criteria will exceed the Northern Cheyenne nondegradation thresholds. (21,23,49,55,57)

Response: Section 518 of the federal Clean Water Act grants EPA authority to treat Indian Tribes as States for the purposes of establishing water quality standards. The tribe has adopted water quality standards and these standards have been submitted to EPA for review and approval. At this time, EPA has not approved the Northern Cheyenne water quality standards nor nondegradation criteria.

The Department has conducted supplemental analysis assessing the impacts of the proposed discharge on tribal water quality standards, including nondegradation provisions. The results of this analysis indicate that the proposed tribal water quality standards will be met at the southern boundary of the reservation. The analysis also concluded that nondegradation criteria would not be met in some months. See administrative file for: Monthly Mean Electrical Conductivity (EC), and Monthly Mean SAR; Tongue River at Birney Day School Bridge, Birney MT.

27. Comment: Commenter states, “ Any increase in discharges may further degrade the Tongue River...”. Commenter expresses that any further degradation could negatively impact the beneficial use of the Tongue River water for irrigation. (22)

Response: In June 2003, the Board of Environmental Review adopted regulations concerning the development of permit conditions and standards for surface water protection from CBNG discharges. Included in these rules [ARM 17.30.670 (7)] the board required “the department shall determine effluent or compliance limits by using a flow based analysis that considers a range of flows or monthly flow probability.” In the application received by the Department, was a flow based operational scenario that would allow for a daily flow determination based on receiving water flows. The Department chose to develop a more conservative approach in permitting in which seasonal USGS 7Q10s were used to develop permit conditions.

Also, in ARM 17.30.670 (2)&(3) are standards developed by the Department and approved by the board to protect all surface water beneficial uses, which include irrigation. The board even went to lengths to develop standards for electrical conductivity and sodium adsorption ratios for the irrigation and non-irrigation seasons.

The standards adopted by the board are at levels which allow for irrigation of the most salt sensitive vegetation grown in the area. Standards were developed as a maximum level that would not affect these species of plants.

28. Comment: Commenter states, “ Outfall 001 as described would discharge into the Tongue River which the tribe does not support to prevent any degradation of the Tongue River which the tribe is a major stakeholder.” (23)

Response: The Department does not agree. Refer to comment #21 for denying a permit for “cause”.

29. Comment: Commenter questions the rational for permit language pertaining to a TRE/TIE. Commenter states that, “The very presence of toxic pollutants should indicate the potential for irreparable harm to human life and environment. Redeveloping compliance plans and adjusting numerical limitations to control toxicity may enable the continuance of having toxic pollutants present.”

Commenter states the permits should be invalidated until all stakeholders are notified and informed. (23)

Response: This language does not imply there is toxicity in the effluent. This standard language allows for additional identification and reduction of toxics that may become present. The purpose of WET testing is to identify any synergistic interaction between the effluent and receiving water that may become toxic to aquatic species.

The permit contains numeric effluent limits for all constituents that may exceed the applicable water quality standards.

30. Comment: Commenter stated numerous requests for information pertaining to the permit issuance and compliance. (23)

Response: The state of Montana has an open records policy. Any or all correspondence including violation letters, to the permittee is available to the public upon request. However, the MDEQ cannot commit in advance to providing this information to outside parties as it occurs. The Water Protection Bureau staff will make every effort to keep other state and federal agencies informed as to any violation of this permit. In addition to this direct line of communication the MDEQ enters all violations, including single event, permit exceedances, and inspection violations directly into the EPA's permit compliance system (PCS) database. This information is available to agencies through PCS and to the public through the Environmental and Compliance History Online (ECHO).

The Department's files are open to the public, and are available for review Monday through Friday, between 8:00 am and 5:00 pm.

31. Comment: The commenter made numerous comments concerning permit boilerplate standard language. (23)

Response: When the State of Montana was granted primacy in administering the NPDES permit system, the Department incorporated a standard set of permit conditions as stated in 40 CFR 122. These conditions establish the recording, reporting, and compliance aspects for the administration of these permits. These conditions have been incorporated by reference into rule in ARM 17.30.1303.

32. Comment: Commenter states, "NPDES permit issuance does not preclude 401 Certification. The waiver of 401 certification under the MPDES permitting system does not allow for adequate checks and balances for proper permitting". (23)

Response: The commenter incorrectly states the intent of the 401-certification process. Under section 401 of the CWA, any application for a federal license or permit to conduct activities that may discharge to navigable water, must provide the licensing agency with a certification from the state in which the discharge occurs. This certification is necessary for activities that are not regulated under an MPDES permit [ARM 17.30.105(2)].

33. Comment: The commenter, "...requests that MDEQ base any allocation of available assimilative capacity caused by issuance of discharge permit for CBNG produced water in the Tongue River watershed on an equitable process". "This would preclude an inequitable percentage of available assimilative capacity for EC and SAR being allocated to one CBNG operator on the Tongue River drainage." (25)

Response: Permits and any applicable waste load allocation are issued on a first-come basis, contingent on available assimilative capacity. See response to comment #13, #28, and #38.

34. Comment: The commenter states, "The current aquatic chronic criterion of 5 ug/l selenium is not adequate for preventing adverse effects on fish and aquatic birds." The commenter states that a CCC of 2 ug/l should be used to be protective. The commenter also states that several methods used in analysis should be avoided due to elevated detection limits and poor precision affects. (26)

Response: The Board of Environmental Review is required to set standards for priority pollutants, and other pollutants which have the potential to affect beneficial uses of state waters. All standards for pollutants are listed in WQB-7 [ARM 17.30.624(2)(f)]. At this time the most stringent aquatic life standard for selenium is set at 5 ug/l. In the reasonable potential calculation 15% of this value or 0.75 ug/l was used to determine significance.

In accordance with 40 CFR 122.41(j)(4) and 122.4(i)(4), the permit requires that samples be analyzed in accordance with test procedures approved under on 40 CFR 136. There are currently five approved methods for the analysis of selenium in this regulation. The permittee may select any one of these methods that can achieve the minimum level specified in the permit.

35. Comment: Commenter states, Appendix V, the receiving water SAR is different from permit MT0030457 and MT0030724. Considering the receiving water values for each permit appears to be based upon identical USGS monitoring data, these values should be the same. (27)

Response: In MPDES permit MT0030457 the values were formatted to the incorrect decimal places. The formatting has been corrected. No change is necessary due to the fact that the Excel spreadsheet calculates a result based on the actual value and not the formatted value.

36. Comment: Commenter requests notification of any violations associated with these permits. This will assist other state and federal agencies to be apprized of the issues related to these permits. (27)

Response: The state of Montana has an open records policy. Any violation letter or any other correspondence with the permittee is available to the public upon request. However the MDEQ cannot commit in advance to providing this information to outside parties. The Water Protection Bureau staff will make every effort to keep other state and federal agencies informed as to any violation of this permit. In addition to this direct line of communication the MDEQ enters all violations, including single event, permit exceedances, and inspection violations directly into the EPA's permit compliance system (PCS) database. This information is available to agencies through PCS and to the public through the Environmental and Compliance History Online (ECHO).

Comments received at the Public Hearing in Colstrip MT

37. Comment: Comments were received by individuals questioning the role or purpose of a permit in various ways. (29,37,39,40,41,42,45,46,48,49,50,53,56,59,61,63)

Response: These comments indicate varying degrees of knowledge of the permitting process, how standards are developed and how they are implemented. State and federal regulations set forth criteria for which a permit issued under the Montana Pollutant Discharge Elimination System (MPDES) may be terminated or denied [ARM 17.30.1363 and 40 CFR 122.64]. The Department has the obligation to either issue or deny permit applications based on cause. Should all the conditions applicable to the proposed discharge meet the statute and rule, the Department is required to issue a permit. Under the MPDES permit program, there are two mechanisms in place to limit pollutants discharged to state waters. They are classified as technology based or water quality based. During the permit development both are evaluated and the most stringent limitation applied to the discharge permit.

Technology based limits enact a reduction in pollutant concentration based on a level of treatment. Varying levels of treatment make up the technology limitations, conversely the higher level of treatment the greater reduction in pollutant concentrations. The level of treatment required is based on the date the technology limit was established or the application date for permit coverage. In the absence of technology-based limits, water quality based limits apply.

The Department, to limit priority pollutants to levels that are safe for human health, aquatic life, and to protect beneficial uses, has developed water quality standards. Utilizing standards, a reasonable potential determination is made. If the pollutant level in the receiving water after mixing, is greater than the water quality standard, it is defined as having reasonable potential to exceed standards. Once a pollutant is defined to have reasonable potential, MPDES permit limits are developed based on the receiving water

quality to maintain all current or anticipated beneficial uses. Water quality standards cannot be exceeded in the receiving water except in limited situations when a mixing zone is granted.

Contained in the permit are additional conditions the permittee must adhere to. The permittee must monitor the discharge for the pollutants, as required by the Department and must report the monitoring results. Additional permit language allows for the permit to be reopened and modified, if, in the case the permittee is not adhering to the limitations required in the permit.

38. Comment: Several commenters question why produced water cannot be beneficially reused. The commenters expressed that if the WQ is sufficient for other uses (livestock watering or industrial consumption), allow them to use the water. Others question why past beneficial uses are not being maintained.

Other commenters question industrial reuse of the water and the effectiveness of managed irrigation. (9,12,14,32,33,35,36,37,45,47,48,51,52,55)

Response: CBNG produced water that is not discharged to state surface waters as a waste may be beneficially used, but a water use permit from DNRC must be obtained prior to putting the water to a beneficial use. DEQ disagrees that past beneficial uses of the Tongue River are not being protected. The water quality standards adopted by the Board have been approved by the U.S. EPA as protective of all beneficial uses of the water.

39. Comment: Commenter brought forward current monitoring efforts in place to evaluate ambient WQ in the Tongue River and soil sites in the watershed. Data from this monitoring will document changes in water or soil chemistry as development occurs. (34,41)

Response: The Department recognizes the current monitoring activities, and is an active participant in the process. Results from the monitoring activities will confirm influences from permitted actions and aid in the evaluation whether beneficial uses are being maintained.

40. Comment: Commenter misrepresented the public comment/ public hearing requirements for all MPDES permits issued. (46)

Response: The Department is required by rule to provide a public notice, and allow for a public comment period for all actions listed under ARM 17.30.1372. The public notice for this action included the scheduling and locations for public hearing to solicit local input in the permitting process. All significant comments received during the public comment period will be responded to.

41. Comment: Comment was received that flow monitoring was not required in the draft permit. (53)

Response: The commenter is incorrect. The permit requires continuous monitoring of effluent volume. This will require the permittee to install a continuous flow-monitoring device. The permittee will be required to report instantaneous maximum and average daily flow for each reporting period.

42. Comment: Comments were received concerning the safety of drinking water supplies from the development of CBNG. (54)

Response: Criteria used to determine reasonable potential and for the development of permit limits, reflect human health and SMCL drinking water standards. In the development of the permit, using these standards protect the beneficial uses, including uses as a drinking water supply. Review of the public

water supply sources shows no withdrawals from the Tongue River for drinking water from the WY crossing to the mouth at Miles City.

43. Comment: Comment was received requesting the Department to set aside the permits until the Treatment as State determination is made by the EPA concerning the Northern Cheyenne water quality standards and permitting program. (57)

Response: State and federal regulations list the specific causes for which a permit issued under the National Pollutant Discharge Elimination System (NPDES) may be terminated or denied [ARM 17.30.1363 and 40 CFR 122.64]. In summary these 'causes' are: 1) noncompliance with a permit condition; 2) the permittee's failure to fully disclose relevant information or misrepresentation of facts; 3) endangerment of human health or environment; and, 4) elimination of the condition regulated by the permit.

The Department has a statutory responsibility to issue or deny permits in a timely manner. Setting aside permits for actions outside the scope of regulatory oversight does not constitute "cause".

Comments concerning the Environmental Assessment

44. Comment: Commenters states that tiering the EA into the FEIS is unlawful. (9,12,14,20,21,23)

Response: The EA analysis tiers to and incorporates by reference the information and analysis contained in the: *Montana Statewide Oil and Gas Final Environmental Impact Statement and Amendment of the Powder River and Billings RMP's* (MTFEIS) approved by the MT BO&GC, and DEQ, and the federal BLM. In addition, the EA tiers to and incorporates by reference the information and analysis contained in the EAs for individual plans of developments for the CX Ranch, Badger Hills, Dry Creek and Coal Creek APDs. These EAs have been developed pursuant to the MOU between the BLM, DNRC, BO&GC and the DEQ, and have been approved by each participating agency. The validity of these documents has been contested for federal actions at the federal level, but not for state actions on the district level. It is the Department opinion that these documents are valid in determining state actions at this time.

45. Comment: Commenter states that the project description contained in the EA was inadequate for the public to understand the scope of the project. (9,14)

Response: The Department believes the project described in the EA was adequate. The Department refers to, and makes available all documents related to the permit action in the public notice and posts them on the Department's web site.

46. Comment: Commenter states that any additional discharge of produced water will impact soils and deposit salts. Other commenters state that soil erosion will increase due to produced water discharge. (9,23)

Response: Refer to response #28. The permit complies with all standards adopted by the board to protect future and existing uses including irrigation. Any increase in soil erosion resulting from the discharge will be negligible. Discharges are limited to outfalls at the river or through diffusers in the river. No overland flow will occur prior to discharge to the river.

The permittee is also required to apply for and receive authorization under the Storm Water General Discharge Permit for Construction Activities should concurrent disturbances exceed one acre. The authorization requires best management practices be installed to limit the transport of sediment from the project site.

47. Comment: Commenter states that salts will load in the reservoir and be flushed downstream in the irrigation season. Another commenter stated that development will draw down the reservoir level. Additional comments were received stating erosion will significantly impact wetland plant species. (9,12,23)

Response: Commenter inserts “impacts” for “uses” as stated in the EA. The argument stating, “downstream impacts would not be diminished”, is substantiality different than what the EA states, “downstream uses will not be diminished”. It is unclear what conclusions the commenter is trying to draw.

Commenter states the salt load in the river “may as much as triple”. See response # 28 for standards discussion.

Commenter states the salts will store in the reservoir and be flushed out during the irrigation season. In the cumulative impact analysis monthly water quality of the Tongue River system was analyzed. In this analysis, salts (assumed to mean salinity or EC) were evaluated at worst-case conditions. Salts (EC) loads were carried through the watershed and evaluated at each reach. All point source loads were inputted and non-point source influences (based on historic conditions) were allowed. The analysis looked at each reach and compared instream conditions to standards applicable to the reach. Results from the analysis showed for all sources discharging to the Tongue River and reservoir, standards will not be exceeded in any reach or at the last point analyzed (Birney).

48. Comment: Commenter states that cumulative impacts modeled in the EA were not disclosed. Other commenters state that the department must look at all discharges and evaluate the impact to the Tongue River and reservoir. Additional comments questioned long term cumulative impact from CBNG development. (9,21,28,50,53,54)

Response: Refer to response #51. As presented in Attachment 2 of the EA the cumulative impact analysis narrative lays out the rationale and methodologies used to model the impacts from this state action. Contained in the 24 pages of text, graphs, and spreadsheets is the cumulative analysis of all input to the Tongue River system that are known, including: Fidelity’s proposed actions, Decker Coal mines, Spring Creek Coal, and Powder River Gas LLC influences.

Currently the Department is monitoring assimilative capacity and instream conditions on a routine basis. If, in the event instream conditions warrant, the Department will reopen permits to modify limits and conditions to maintain water quality standards and beneficial uses.

49. Comment: Commenter states that the department failed to protect water quality in the past when the instream flow dropped below 7Q10. Commenter asked for assurances for the department to act in future incidences. (9)

Response: During the permit development process the Department is required to look at worse case conditions to develop permit conditions. To analyze worse case conditions in the receiving water the rule requires the 7Q10 or comparable flow rate to be used. Should the instream conditions drop below the 7Q10 the conservativeness built in the standards and permit limitations are anticipated to protect the receiving water. Most low flow events do not last longer than a week. These events occur very infrequently, less than once every ten years.

During the cumulative impact analysis, it was discovered that during low flow events, the possibility exists for instream conditions to exceed the water quality standard for EC. If instream conditions exceed standards for EC, language inserted into the permit MT0030457 will kick in for increased monitoring.

The permittee will be required to monitor EC on a daily basis below their discharge points, and reduce flows or eliminate flows, should the instantaneous maximum EC for the monitoring period be exceeded.

50. Comment: Commenter states the EA fails to disclose the area to be disturbed by the permit actions. Other comments were received stating culturally significant wetland species have been ignored in the analysis. Four other commenters made generic reference to cultural aspects of vegetation in the area. (9,23,38,40,50,52)

Response: The scope of the analysis for this EA was limited to the approved PODs in the CX Field. The level of disturbance for this permit action has been analyzed by the BLM, BOGC, and the DEQ. By evaluating the EA in this fashion, there is redundancy built into the analysis. The FEIS, concluded on a regional level the impacts to the whole basin, where as the impacts for the individual PODs were looked at for each APD. The main scope of this EA is to evaluate the impacts from the discharge on the receiving water.

For surface disturbances, no new disturbance is allowed that is outside the areas analyzed in the APDs. The only exception will be for the installation of diffusers in the channel. Permitting for the placement of these outfall diffusers will be via the Army Corps of Engineers, Conservation Districts, and DEQ. The physical outfalls being placed in the river channel will minimize impacts to wetlands and other culturally important species. Vegetation in the riparian areas will not be affected by the discharges.

Commenter references the FEIS and states 66457 acres will be disturbed. The scope of this action; CX Ranch, Badger Hills, Dry Creek, and Coal Creek the total acres disturbed is 508.27, with 318.48 being short term disturbances. Due to the fact the POD were a phased development, the total acres disturbed would be even less. The time frame from the CX Ranch to the Coal Creek POD exceeds five years; concurrent reclamation has minimized any cumulative affects from disturbed areas.

As contained in the FEIS the BLM incorporated NC mitigation measures to allow for consultation with the tribe to protect areas identified as plant gathering sites (Northern Cheyenne Mitigation Appendix). The operators will conduct plant inventories, with mitigation measures enacted to protect the impacted areas.

51. Comment: Commenter states that in the EA, minimal impacts to aquatic life is unsupported. Additional comments were received stating the EA fails to consider the indirect impacts on aquatic life and fisheries including potential revenue loss from local businesses. (9,12)

Response: All standards are developed with an acute and chronic component. Chronic impacts are the long-term issues the commenter states have not been addressed. During the development of these permits, the most stringent WQ standard was used for determining the nondegradation criteria.

With concurrent monitoring by the permittee and the Inter-agency working groups (States of MT and WY, BLM, USGS, and NC Tribe), that include surface water and biological monitoring, the regulatory agency's will not be ignorant to changing conditions in the basin.

Indirect impacts to the river and downstream riparian areas have been influenced in a greater degree by the drought and flow-regulation from the reservoir.

52. Comment: Commenter states there would be no loss of economic revenue to the state if the department would require effluent limitation and technology controls. Commenter states the permits would become unnecessary because technology would prevent direct discharges with out decreasing profits of state revenue. Another commenter expressed that if CBNG is not allowed to proceed, the state, local and individual lease holders would have an immediate and irretrievable loss of revenue. (9, 14,32)

Response: See response to Comment #12. In developing permit limitations, the Department looked at the net affect to the receiving water at the point of discharge and prescribed limits to protect it. It is the responsibility of the permit holder to meet these limits. In this case, the level of treatment the applicant proposed meets the criteria for limitations set in the permit.

53. Comment: The commenter states there would be a taking of private property due to dumping salts into the receiving water and then using this water to irrigate soils. Commenter states the soils would become unusable and will at a minimum reduce the productivity of all privately irrigated property.

Two other commenters stated that allowing the discharge would constitute a taking of their water rights in the Tongue River reservoir. (9,46,49)

Response: Refer to response to Comments #28 and #40. Permits are written to properly adopted standards that are protective of beneficial uses. Further, state and federal regulations list the specific causes for which a permit issued under the National Pollutant Discharge Elimination System (NPDES) may be terminated or denied [ARM 17.30.1363 and 40 CFR 122.64]. In summary these 'causes' are: 1) noncompliance with a permit condition; 2) the permittee's failure to fully disclose relevant information or misrepresentation of facts; 3) endangerment of human health or environment; and, 4) elimination of the condition regulated by the permit. According to the rules cited above, the Tribe's claim of first right to the discharged CBNG water is not a "cause" for denying issuance of the permit.

54. Comment: Commenter states the EA draws unsubstantiated conclusions on water quality and the potential impacts to aquatic life and food availability to other species. The commenter adds that failure to conduct monitoring and studies of aquatic life violates the Montana constitution and companion regulations. (9)

Response: Refer to response to comments #8 and # 25. The commenter is incorrect in the assertion that the permits fails to prescribe monitoring or aquatic life analysis. The permit requires extensive monitoring for chemical specific pollutants, whole effluent toxicity, in addition to biological monitoring in the Tongue River.

55. Comment: Commenter states the EA fails to mention critical spawning areas for walleye, sager, small mouth bass, and other species of the Tongue River. Commenter adds that the trout fisheries above/below the dam have not been considered nor the impacts analyzed. (9)

Response: The permit has been developed according to the water use classification of the upper Tongue River; which is a B-2 water. B-2 waters are to be maintained for marginal propagation of salmonid species and associated aquatic life (ARM 17.30.624(1)). To maintain the water quality of this receiving water, a conservative approach was taken. The Department determined that early life stages were present year around in the receiving water.

All of the species the commenter identified, walleye, sager, small mouth bass are warm water species for which the fishery is not managed. Trout on the other hand, are salmonid species for which the water use classification is protective.

56. Comment: Commenter states the department failed to consider a reasonable range of alternatives. Commenter states that the department needs to consider reinjection, or requiring other technologies to treat all the wastewater prior to discharge. Another commenter questions why were other alternatives not considered? If so, what were they and why were they not addressed in the EA? If not, why not? (12,14)

Response: Refer to response to comment #12. The level of analysis undertaken by the Department reflects the understanding of the significance of impacts on the environment. The Department is confident that no significant impacts will result due to the proposed mitigations required in the individual PODs. Since the scope of this action is for PODs already approved, no additional analysis is required.

The Department has determined that the proposed level of treatment is sufficient for the applicant to adhere to limitations required in the discharge permit. With no significant impacts identified in this action an alternatives analysis is unnecessary. Further, the agency would not have the authority to require alternatives if the requirements of the Water Quality Act are being met. In addition, contained in the FEIS, alternative B analyzed reinjection and concluded (pg2-11): “Due to the high cost of injection and the uncertain success in disposing of all produced waters over the life of a group of CBM wells, injection has not yet been shown to be commercially viable for the CBM industry in the PRB.”

57. Comment: Commenter states the EA fails to discuss the impacts of existing development of methane migration up wells and other natural features or the dangers such migration poses to people living and working near methane development. (12)

Response: By tiering this EA to the MTFEIS and individual POD EAs, methane mitigation was evaluated. The scope of this EA for permit actions was to evaluate the significance on impacts to the environment by the discharge of produced water. Additional methane mitigation is outside the scope of this permit action.

58. Comment: Commenter states: “The EA needs to estimate reclamation costs and evaluate whether Powder River Gas’s performance bond is adequate to cover such costs.” (12)

Response: The Water Quality Act does not address reclamation of CBNG developed lands. The Board of Oil and Gas and BLM statutes address reclamation. Reclamation costs have been evaluated in the MTFEIS and individual PODs EAs.

59. Comment: Commenter States: “The proposed Tongue River Railroad will pass near the proposed project, yet the EA fails to mention the railroad or its impacts; it also fails to discuss the cumulative impacts on air quality, wildlife, surface water quality or aquatic life.” (12)

Response: Given the uncertainty that has surrounded the TRR project, which has been under consideration for 20 years, it was not judged to be reasonably foreseeable. CBNG exploration can proceed in the subject project area independent of plans for the TRR. Should the TRR project progress; the EIS analysis of the TRR would be expected to include consideration of CBNG activities in the area as part of its cumulative impact analysis.

60. Comment: Commenter states that the description of methane development in Wyoming is inadequate. Commenter states “the EA admits that existing CBNG[sic] development in Wyoming has degraded the Tongue River at the state line.” (12)

Response: In developing terms and conditions for this permit action, the state cannot reasonably foresee CBNG development in Wyoming. But, to allow for protection of the receiving waters several activities have been undertaken. First, an interagency working group that consists of the states of Montana and Wyoming, the BLM field offices in both states, FWP agencies, USGS agencies and affected tribes has been organized. This group monitors and coordinates CBNG activities in the PRB. Secondly, this group advises, coordinates, and evaluates water quality data generated by state and federal agencies. Thirdly, the Department requires the permittee to monitor instream conditions. And lastly, there is reopener language in the permits. This permit language allows for the permits to be reopened and limits re-established should the receiving water quality change substantially.

The citation quoted by the commenter “it is not anticipated that CBNG development in Wyoming will combine with the proposed action to create impacts to surface waters.”, cannot be verified in any of the documents: EA, SOB/Fact sheets, draft permits or joint EAs cited and used in this action. The commenter states “the EA admits that existing CBNG[sic] development in Wyoming has degraded the Tongue River at the state line”, is not stated or inferred in the EA or any companion document.

The commenter is incorrect in his assertion that no direct discharge permits are issue to the Tongue River in Wyoming. There are two active, direct discharge permits issued in Wyoming. One to Goose Creek, a major tributary of the Tongue and the other is directly to the Tongue. On Prairie Dog Creek there are three permits, two permits for impoundment that allow for discharges resulting from storm events and one permit for discharge of treated produced water.

61. Comment: Commenter questions the assimilative capacity of the existing PSD Class II increment for air emissions. Commenter states that additional compressor stations, in addition to the Tongue River Railroad will have a cumulate impact on the air quality in the area.

Other commenters state that because the FEIS inadequately addresses the issue of air quality it is inappropriate to tier the air quality analysis in the EA on the FEIS.

Additional comments were received stating that cumulative impacts will result from CBNG development to the Class I air shed over the Northern Cheyenne reservation.(12,14,23)

Response: Refer to comments #48 and#63. For the purpose of this action, only PODs approved by the BLM, BOGC and DEQ have been included. In the EAs for these PODs, analysis of each PODs contribution and a cumulative analysis have been undertaken. The DEQ has issued air quality permits to the operator, when required, that limit the total load of pollutant that can be discharged to the airshed. Additional analysis for this action is not required.

62. Comment: Commenter states the EA fails to discuss impacts of existing methane development in Montana on local sage grouse populations and leks. Commenter goes on to state the EA fails to describe active or inactive leks and cumulative impacts by future development. (12)

Response: Affects to sage grouse habitat and leks were analyzed in all joint EAs for the approved PODs. Each POD is required to have a wildlife monitoring and protection plan developed and approved in accordance to the CBNG programmatic wildlife and protection plan pursuant to criteria in the MT FEIS. A review of the joint EAs and additional information submitted through coal mining monitoring activities, show one inactive lek impacted by an impoundment located on private surface. Mitigation measures include avoidance and limiting activity during the nesting period.

63. Comment: Commenter states the discussion on aesthetics is inappropriate and misrepresenting the actual impact of CBNG[sic] development. Commenter states there is little development in the area, and any development would be an enormous impact. (14)

Response: The Department disagrees that there is a significant impact to aesthetics in the area. From actual observations in the area, visual impacts from CBNG development are minor. Mitigation measures required through the MT FEIS and individual POD, joint EAs have minimized the impacts to a nonsignificant level. No further analysis is required.

64. Comment: Commenter states that a full environmental impact statement is required for the permit. Commenter thinks that the impacts are so significant that a EA is inadequate under any circumstances. (20)

Response: The Department does not agree. All impacts identified in the MT FEIS and POD EAs have been mitigated to nonsignificant levels

65. Comment: Commenter states : “ The action may potentially impact the wetland plant species that are culturally important to the Northern Cheyenne tribe. Another commenter states: “If the proposed development continues we face the possibility of losing part of our cultural heritage.”

Additional comments were received concerning the cultural importance of water and loss of historic sites due to development. (23,24,37,38,55,58,60,62,63)

Response: Through the federal trust responsibility, the BLM has implemented mitigation measures for the preservation of culturally important species that may be present within the PODs areas. These mitigation measures include: plant inventories for the areas disturbed, consultation with the tribe, avoidance of areas known to be ceremonial or plant gathering locations, and allowing tribal representation during construction activities on federal surface ownership.

66. Comment: Commenter stated: “ There’s one specie, I can’t remember the name of it now,...which is an endangered specie.” Commenter was referring to specie of grasshopper located south of Ashland. (59)

Response: In all of the documents associated with CBNG development in the PRB in Montana no reference has been made concerning any grasshopper species that is listed as endangered or threatened. Searches of the NRIS database has not identified any grasshopper species as being listed as having special status or being threatened or endangered. Searches of the regional FWS web sites (the agency tasked with managing the endangered species act) have failed to identify this species also.

67. Comment: Commenter stated that an ethnographic study is required to let the NC define their own culture and culturally important areas. (60)

Response: Three ethnographic studies have been conducted in the area, focusing on the traditional cultural values of the Crow and Northern Cheyenne tribes. Under the federal trust responsibility, the BLM has implemented mitigation measures to protect culturally important norms and sites. Should the tribe wish to pursue another ethnographic study they may do so at their convenience.